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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1009

ADRIANO MERLANO BERSIA, CARLO NOVELLA, ERNESTO VIANI, GIUSEPPE PRATALONGO, GIUSEPPE CARTA, ERNESTO BENEDETTI, SEVERINO ENRICO ALIAS ENRICO SEVERINO, PLACIDO FRISONE, GIUSEPPE SICCARDI AND ANGELO NAPOLI, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1010

PAOLO PIERACCINI, CARLO SAGLIETTO, ALBERTO ZAPPALA, MARIO GARAU, ALCIDO ROSSI, NUNZIATO SCAMARDELLA, NUNZIO DAMIANO, GIROLAMO MESSINA, GIUSEPPE PUGLISI, ROCCO PALUMBO, GIUSEPPE IADICOLA, GAETANO TARATINO, LORENZO TRAVERSO, ALFIO FRESTA AND GIO BATTA SEGRETI, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 1011

LUIGI SCHIAFFINO, PAOLO CALTAFIANO, LORENZO BARZELATTO, CESARE LI MAZZO, CARLO EMANUELE GALLINO, FRANCESCO SCIANCALEPORE, GIUSEPPE

ZIZZO, LORENZO SALVATORE MAFFEI, SERGIO MINERVINE, ANGELO ARMENIA, ARMANDO MORFI, DANIELE SORRENTINO, UMBERTO SARBIA, PASQUALE DE GREGORIO, CONSTANTINO CABOARA AND GIUSEPPE ABRAZZO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 100–105) is reported in 124 F. (2d) 310.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered December 26, 1941 (R. 105–106; Pieraccini R. 142–143; Schiaffino R. 150–151),[1] and petitions for rehearing were denied January 31, 1942 (R. 107; Pieraccini R. 144; Schiaffino R. 152). The petitions for writs of certiorari were filed March 4, 1942. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

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[1] The letter "R." is used to designate the record in the *Bersia* case, No. 1009. References to the records in the *Pieraccini* and *Schiaffino* cases, Nos. 1010 and 1011, are specifically noted.

QUESTIONS PRESENTED

I. Whether the destruction, by officers and crew, of the motive power and instrumentalities of navigation of a merchant vessel of foreign registry while the vessel is tied up in a port of the United States falls within the interdiction of section 1 of Title III of the Act of June 15, 1917,[2] 40 Stat. 217, 221. This question raises, in turn, the following subsidiary questions:

A. Whether Title III applies to such acts of destruction when committed at the direction of the foreign owner of the vessel.

B. Whether, in view of the prohibition contained in section 3 of Title II of the Act of June 15, 1917 (against wilful destruction or injury of any private vessel, foreign or domestic, by the owner, officers, or crew), Title III applies to acts of destruction of the motive power and instrumentalities of navigation of a merchant vessel of foreign registry committed by the officers and crew of such a vessel.

C. Whether Title III applies to a merchant vessel of foreign registry lying in a port of the United States but not actually engaged in foreign commerce at the time of the commission of the acts denounced by Title III.

D. Whether malice against the owner of the vessel is an essential ingredient of the offense defined in Title III.

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[2] Since Title III contains only one section, its provisions will hereinafter be referred to only by the title number.

E. Whether petitioners were improperly convicted on the theory that Title III denounces acts committed with intent to injure the vessel independently of intent to endanger the safety of the vessel.

II. Whether Title III violates the Fifth Amendment because, in so far as the title applies to owners of vessels and their agents, it unjustifiably infringes property rights, or because of indefiniteness.

STATUTE INVOLVED

Title III of the Act of June 15, 1917, c. 30, 40 Stat. 217, 221 (U. S. C., title 18, sec. 502), provides:

> SECTION 1. Whoever shall set fire to any vessel of foreign registry, or any vessel of American registry entitled to engage in commerce with foreign nations, or to any vessel of the United States as defined in section 501 of this title, or to the cargo of the same, or shall tamper with the motive power or instrumentalities of navigation of such vessel, or shall place bombs or explosives in or upon such vessel, or shall do any other act to or upon such vessel while within the jurisdiction of the United States, or, if such vessel is of American registry, while she is on the high sea, with intent to injure or endanger the safety of the vessel or of her cargo, or of persons on board, whether the injury or danger is so intended to take place within the jurisdiction of the United States, or after the vessel shall have departed therefrom; or whoever shall at-

tempt or conspire to do any such acts with such intent, shall be fined not more than $10,000, or imprisoned not more than twenty years, or both. The term "United States", as used in this section, includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.[3]

STATEMENT[4]

Petitioners, who were officers and members of the crews of three merchant vessels of Italian registry, the *Villarperosa, Euro,* and *Pietro Campanella,* were indicted under Title III of the Act of June 15, 1917 (*supra,* pages 4–5), for tampering with the motive power and instrumentalities of navigation of the vessels while they were within the jurisdiction of the United States, with intent to injure and endanger the safety of the vessels (R. 1–2).[5] The relevant facts, appearing from the

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[3] Title II of the Act of June 15, 1917, 40 Stat. 217, 220, as amended by section 3 of the Act of March 28, 1940, 54 Stat. 79 (U. S. C., title 50, secs. 191–194), which petitioners contend is material in interpreting Title III, is set forth in the Appendix, *infra,* pp. 20–22.

[4] Since the facts of the present cases are substantially similar, a single statement will suffice for all. The circumstances of the *Bersia* case as set out below may be taken, with the exception of the names of petitioners and names and locations of the vessels, as applying to the *Pieraccini* and *Schiaffino* cases, unless otherwise indicated.

[5] Petitioners in No. 1009 were indicted in the Eastern District of North Carolina (R. 1), and petitioners in Nos. 1010 and 1011 in the District of Maryland (Pieraccini R. 1; Schiaffino R. 1).

evidence given at the trial, may be summarized as follows:

Petitioner Bersia, master of the *Villarperosa,* was instructed by the manager of the corporate owner of that vessel before leaving Genoa that should hostilities break out between Italy and another country during the voyage he was to proceed to the nearest neutral port, put himself and his ship at the disposal of the Italian authorities, and follow all orders given him through the local Italian Embassy (R. 32–33). On February 19, 1941, while the *Villarperosa* was anchored in the port of Wilmington, North Carolina,[6] the Assistant Naval Attaché of the Italian Embassy in Washington advised Bersia that he was to destroy the motive power of his vessel upon receiving a code telegram (R. 33). Bersia received such a telegram on March 20, 1941, and immediately ordered his chief engineer, petitioner Novella, to destroy the motors of the ship (R. 33–34). Novella, assisted by the other petitioners, proceeded to carry out the order (R. 34, 37–39).

Bersia testified that he ordered the motors destroyed in order to save "the ship from falling in the hands of enemies" of his country and that he had no intention "to injure or endanger its safety" (R. 34). Each of the other petitioners admitted

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[6] The *Villarperosa* had arrived at Wilmington on June 4, 1940 (R. 32), and remained there after the beginning of war between Italy and Great Britain on June 10, 1940 (R. 33).

his participation, and stated that he acted solely upon the orders of his superior and that he did nothing to endanger the safety of the ship (R. 38–39).

While these events occurred the *Villarperosa* was anchored across the Cape Fear River from the Custom House at Wilmington (R. 8). On March 21, 1941, the Captain of the Port, apparently suspecting that the ship would be or had already been disabled, ordered that it be moved to a safer mooring about two miles up the Cape Fear River where it would be less likely to break loose and become a danger to the harbor (R. 8, 9). A tug boat captain who was retained by Bersia to move the *Villarperosa* refused to assume this responsibility because the ship had no motive power (R. 10, 29, 34–35). He testified that for this reason it was dangerous to the safety of the vessel to attempt to move it through a drawbridge on the route (R. 30). Finally, after an officer of the Coast Guard agreed to assume responsibility, the ship was moved upstream (R. 30, 35).

In the *Pieraccini* case, witnesses for the Government testified that the main engine, radio equipment, regular and auxiliary steering equipment, much of the fire equipment, the cargo winches, and the two main boilers of the *Euro,* which was anchored at the time in the port of Baltimore, had been badly damaged and were out of commission (Pieraccini R. 11–16, 24); the

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vessel therefore had inadequate fire protection (*id.* 12, 15–16), the steering apparatus was inadequate even for being towed (*id.* 19, 31), and the safety of the vessel was endangered by virtue of its inability to move under its own power in the event of a storm or other emergency (*id.* 31); because of the destruction of the impeller housing, there was danger of sinking if a single valve failed or was opened (*id.* 13–14, 18, 21, 32). The petitioners did not deny the nature and extent of the damage inflicted.

An inspector of the United States Bureau of Marine Inspection and Navigation testified, in answer to a hypothetical question detailing the items of damage inflicted upon the ship, that in his opinion it was unsafe (*id.* 41–44, 47–48). This was likewise the opinion of Lieutenant Capron of the United States Coast Guard (*id.* 17–18) and of Special Agent Champlin of the Federal Bureau of Investigation (*id.* 31–32), both of whom went aboard the vessel shortly after it was damaged (*id.* 10, 26). Petitioners' witnesses testified that the safety of the vessel was not endangered for the purpose of its remaining completely immobilized (*id.* 77, 103–104).

There was similar testimony in the *Schiaffino* case (Schiaffino R. 19, 21–22, 24–26, 48–49; 102–103, 104–105, 108–109).

Petitioners in all three cases were convicted, and were sentenced to imprisonment for terms vary-

ing from three months to three years (R. 86–95; Pieraccini R. 130–134; Schiaffino R. 137–142). The convictions were affirmed by the Circuit Court of Appeals (R. 105–106; Pieraccini R. 142–143; Schiaffino R. 150–151).

ARGUMENT

I

Petitioners' principal contention is that the acts of destruction which they committed were not within the scope of Title III of the Act of June 15, 1917. The subsidiary propositions upon which this contention is grounded will be considered *seriatim*.

A. Petitioners argue (Pet. 13–41)[7] that at common law defendants similarly situated would not have been guilty of analagous offenses (*e. g.*, malicious destruction of property, arson), that criminal statutes are to be construed in the light of the common law, and that, therefore, owners and their agents are impliedly excepted from the operation of Title III since they are not explicitly included within its terms. This reasoning might well be sound in the construction of a statutory

[7] References to the contentions advanced by petitioners are to the brief in support of the petition for certiorari in the *Bersia* case, No. 1009. The petitions in all three cases raise the same questions, and supporting argument is set forth only in the brief in the *Bersia* case (see Pieraccini Pet. 11; Schiaffino Pet. 11).

offense truly analagous to common-law crimes. Cf. section 285 of the Criminal Code (U. S. C., title 18, sec. 464), *United States* v. *Cardish*, 145 Fed. 242 (E. D. Wis.). But it is obviously inapplicable in the case of a statute having a new and special purpose.

Title III was not designed to protect the owners of vessels against the acts of trespassers, but to protect and foster the public interest in foreign commerce and the instrumentalities by which it is carried on. *Marchese* v. *United States*, decided March 9, 1942 (C. C. A. 5).[8] This is evidenced by the character of the act of which it is a part.[9] Contemporaneous events which prompted enactment of the statute and the act's legislative history make its purpose clear. Cf. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 463; *United States* v. *Union Pacific R. R.*, 91 U. S. 72, 79. The provisions of Title III were occasioned by the German practice early in 1917 of damaging and scuttling German merchant vessels in Ameri-

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[8] The opinion in the *Marchese* case is set forth in the Appendix, *infra*, pp. 22–31.

[9] The Act of June 15, 1917, is entitled "*An Act* to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes." C. 30, 40 Stat. 217; see H. Rep. No. 30, p. 1; H. Rep. No. 69, p. 1; S. Doc. No. 37, p. 1; S. Doc. No. 44, p. 1 (65th Congress, 1st session). Title III bears the caption "Injuring Vessels Engaged in Foreign Commerce." 40 Stat. 221.

can waters.[10] These were not the acts of trespassers against whom the owners of vessels had inadequate redress, but were the deliberate acts of the officers and crews of the incapacitated ships, done at the direction of their owners and government. See *Wierse* v. *United States,* 252 Fed. 435, 441 (C. C. A. 4). The instances were well known to Congress at the time. Representative Walsh, of the House of Representatives Judiciary Committee, stated in debate on the Espionage bill, which became the act of June 15, 1917:

> * * * To conclude, with the exception of the section that I have criticized [in Title I], I submit there is a real need for this legislation, and that without it the various departments of the Government will be powerless to cope with certain situations that have been and are confronting us. For instance, we were told that some of the ships which were tied up in our harbors were used as places wherein plots were being hatched against the Governments with which this Nation was at peace; that some of those ships were crippled because of their machinery being tampered with and destroyed; * * *. [55 Cong. Rec. 1604.]

Speaking later of the provision against "injuring vessels" (Title III, 40 Stat. 221), Representa-

[10] See New York Times February 1, 1917, page 1, column 1; February 2, 1917, page 4, column 1; February 7, 1917, page 4, columns 2, 3, and page 5, column 5; February 8, 1917, page 2, column 4; April 6, 1917, page 1, column 1.

tive Graham, another member of the Judiciary Committee, remarked:

> Anyone can understand why a provision of that kind is necessary. We have had object lessons to teach us. [55 Cong. Rec. 1720.]

The conjunction of the circumstances of the damaging of the German ships with the legislation which became the Espionage Act compels the conclusion that just such acts as petitioners committed were intended to be prohibited by the statute. It is obvious, therefore, that Congress intended the inclusive word "whoever", employed in Title III, to have its ordinary connotation of "everyone". *Marchese* v. *United States,* Appendix, *infra,* pp. 22, 29; *United States* v. *Tomicich,* 41 F. Supp. 33, 35 (E. D. Pa.).[11]

B. Petitioners also assert (Pet. 50–56) that since section 3 of Title II of the Act of June 15, 1917, c. 30, 40 Stat. 217, 220 (U. S. C., title 50, sec. 193), denounces wilful destruction or injury to vessels by their owners, officers, or crews, it creates an exception to the scope of the application of Title III, which applies in terms to everyone, and that, therefore, the latter provision must be interpreted

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[11] Petitioners' related arguments that use of the word "tamper" in the statute indicates that Title III was not intended to apply to owners or those acting under their orders (Pet. 43–49) and that the indictment was insufficient for failure "to lay the property in anyone" (Pet. 98–99) are also without merit for the reasons just stated.

as applying only to trespassers.[12] This argument ignores the fact that the provision against wilful destruction or injury contained in section 3 of Title II is not limited in its application to owners, masters, and crews, but applies as well to any "other person". The provision is not, therefore, legislation dealing specially and, by implication, exclusively with a particular class of persons, but has as wide an application with respect to defendants as Title III.

It is manifest that the important differences between the two provisions are with respect to type of vessel affected and place of the acts done.[13] Section 3 of Title II prohibits wilful "destruction or injury" of "any private vessel, foreign or domestic, * * * within the territorial waters of the United States". Title III, on the other hand, interdicts acts intended "to injure or endanger the safety" of "any vessel of foreign registry, or any vessel of American registry entitled to

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[12] This contention is predicated in part (see Pet. 51–53) upon the fact that section 3 of Title II, as originally enacted, authorized imprisonment for not more than two years (40 Stat. 220), while Title III authorizes a maximum imprisonment of twenty years (40 Stat. 221). It should be noted, however, that section 3 of Title II was amended by section 3 (b) of the Act of March 28, 1940, c. 72, 54 Stat. 79 (U. S. C., title 50, sec. 193), to provide for maximum imprisonment of ten years. The heaviest sentence imposed on any of the petitioners was three years' imprisonment (*supra*, pp. 8–9).

[13] Title III also expressly prohibits attempts and conspiracies to commit the acts principally prohibited.

engage in commerce with foreign nations," when the acts are done within the jurisdiction of the United States or, in the case of American vessels, on the high seas; the offense is complete regardless of where the injury or dangerous condition is intended to become effective. While section 3 of Title II is framed to protect shipping and waterways within American jurisdiction, the design of Title III to protect foreign commerce specifically is readily discernible.

It is not material that there may be some overlapping in the scope of the two provisions and that particular acts may be forbidden by both section 3 of Title II and by Title III; clearly, criminal statutes need not be mutually exclusive in operation, and the existence of section 3 of Title II presents no reason for implying an exception from Title III with respect to persons situated as were petitioners.

C. Petitioners contend (Pet. 56–70) that Title III applies only to acts affecting ships actually engaged in foreign commerce at the time the prohibited acts are committed. However, the terms of the statute negate this contention. Title III covers any vessel of foreign registry or any vessel of American registry entitled to engage in foreign commerce. The two classes of ships specified in the statute are the classes which engage in foreign commerce of the United States and it should not be supposed that Congress intended to leave

such ships unprotected by Title III up to the point at which they become actively engaged in transportation. The background of the statute also strongly contradicts petitioners' position on the present point: the German merchant vessels sabotaged in 1917 were vessels that had been laid up in American ports and were not at the time engaged in foreign commerce.[14] See note 10, page 11, *supra*.

Petitioners stress (Pet. 62–65) the title of Title III—"Injuring Vessels Engaged in Foreign Commerce"—as supporting their contention. We think it plain that these words do not import the meaning attributed to them by petitioners; and regardless of the precise meaning of the phrase, the title of the statute is not available to create an ambiguity where its substance is clear. *Fairport, P. & E. R. R.* v. *Meredith*, 292 U. S. 589, 594.

D. Petitioners argue (Pet. 71–89) that a criminal intent to perpetrate a wrong, in the form of malice against the owner of the vessel, is an es-

[14] Petitioners attempt to explain this history by asserting that Title II, and not Title III, was intended to deal with immobilized vessels, and that the statutory purpose was limited to the protection of navigable waters against scuttling. While it may be true that such was the primary purpose of Title II, that very fact serves to emphasize the applicability of Title III to immobilized ships when it is remembered that the only *sinking* of a German merchantman was that of the *Liebenfels* in Charleston, South Carolina. See *Wierse* v. *United States*, 252 Fed. 435, 440 (C. C. A. 4).

sential requirement of Title III. This contention is based upon the mistaken premise that the purpose of the statute is to protect property-ownership rather than the public interest in ships as instrumentalities of foreign commerce. The argument also is impliedly precluded by the statute, which prescribes a specific standard of intent: "to injure or endanger the safety of the vessel or of her cargo, or of persons on board". The court below was, therefore, clearly correct in holding (R. 103) that "no further showing of malice or intent to commit a wrong is required."

E. Petitioners interpret (Pet. 89–98) the statute as requiring an intent to injure the safety of the vessel or endanger the safety of the vessel, and they argue that an intent to injure the vessel, alone, is insufficient.[15] The Circuit Court of Appeals ruled against petitioners here (R. 103). The wording, context, and legislative history of the provision are inconclusive, yielding only contradictory clues as to its effect. Assuming, *arguendo*, that petitioners are right in the interpretation for which they contend, they have no basis on which

[15] Petitioners cite *United States* v. *Saglietto*, 41 F. Supp. 21 (E. D. Va.), and *United States* v. *Martini*, 42 F. Supp. 502 (S. D. Ala.) in support (Pet. 89–92). On this point the *Saglietto* case was expressly disapproved by the court below in its opinion in the instant cases (R. 104). And Judge McDuffie's holding in the *Martini* case has been disapproved by the Circuit Court of Appeals for the Fifth Circuit in *Marchese* v. *United States*, Appendix, *infra*, pp. 22, 24–28.

to complain of their convictions: in each case the trial court explicitly instructed the jury that the defendants could not be convicted unless the jury found that they intended to injure or endanger the vessel's safety (R. 54, 59, 60–61; Pieraccini R. 110, 115, 117–118; Schiaffino R. 115, 118); and in each case the evidence was plain that the safety of the vessel, even for the purpose of lying in the harbor, was in fact endangered (R. 30, 34–35; Pieraccini R. 11–19, 21, 31–32, 41–44, 47–48; Schiaffino R. 19, 21–22, 24–26, 48–49). It is difficult, in any event, to find substance in the distinction drawn by petitioners between the statutory construction adopted by the court below and that contended for by petitioners; it can scarcely be said that *any* tampering with the motive power or instrumentalities of navigation of a ship that is done with intent to injure the vessel does not endanger its safety.[16]

II

There is clearly no merit in petitioners' contention (Pet. 100) that the application of Title III to owners of vessels and their authorized agents is an unconstitutional invasion of property rights

[16] It is far from clear that, as petitioners have assumed, the safety of a vessel is to be considered solely from the viewpoint of idleness in port; on the contrary the character of Title III of the Espionage Act, as indicated by its background, would strongly tend to show that safety is to be estimated with reference to a ship's normal employment.

under the Fifth Amendment. The power of Congress pursuant to the grant contained in the commerce clause is plenary and as broad as the needs of commerce. See *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 426. Unquestionably this power extends to protection of the instrumentalities of foreign commerce against acts of trespassers or owners designed or calculated to interfere with such commerce. The statute does not take property, but rather is designed to protect and preserve it. While the statute limits the liberty of an owner to destroy or injure his property, this limitation bears a real and substantial relation to the legitimate regulatory object sought to be attained, and therefore satisfies the requirement of due process. Cf. *Nebbia* v. *New York*, 291 U. S. 502, 525.

Nor is there any merit in petitioners' contention (Pet. 100–101) that Title III, as applied to owners of vessels and their agents, is invalid because of the absence of standards by which to determine the limits marking off forbidden from permitted conduct. *Marchese* v. *United States*, Appendix, *infra*, pp. 22, 31. The statute clearly is not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application", nor does it fail "to inform those who are subject to it what conduct on their part will render them liable to its penalties". *Connally* v. *General Construction Co.*, 269 U. S. 385,

391; cf. *Lanzetta* v. *New Jersey*, 306 U. S. 451. Title III, therefore, meets the requirement of certainty in due process of law.

CONCLUSION

The decisions below are clearly correct and the petitions for writs of certiorari present no question calling for review by this Court. It is therefore respectfully submitted that the petitions should be denied.

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